

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-7027

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES D. MCMILLEN,

Plaintiff-Appellant,

VS

NO. 77-7027

LOUIS J. LEFKOWITZ, et al,

APPELLANT'S
BRIEF

Defendant-Appellee.

APPEAL FROM A JUDGMENT AND
DIRECTED VERDICT OF THE U.S.
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF NEW YORK DATED
NOVEMBER 19, 1976.

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STATEMENT OF THE NATURE OF THE APPEAL

STATEMENT OF THE NATURE OF THE APPEAL

Appeal comes from a "directed verdict" of Justice James T. Foley, Presiding Judge, U.S. District Court for the Northern District of New York, at Albany, New York, issued responsive to motion by the defendant amidst trial by jury on November 19, 1976. The matter at trial was a 42 U.S.C. 1983 suit alleging the loss of constitutional rights and damages. Original jurisdiction was established in 28 U.S.C. 1331, diversity of citizenship.

At trial the Court removed the case from the jury contending that plaintiff had not established a prima facie case proving the loss of constitutional rights; and also, a fear that the jury could not appropriately weigh the issue of "good faith belief" as a defense to invoke qualified immunity under the law, which was advanced by the defendant at trial.

Inherent to this appeal is the legality of a "sequence of instruments" used to manipulate and obtain possession of certain of plaintiff's property, both business and personal. Plaintiff at trial presented this "sequence of instruments" as being clearly in violation of plaintiff's constitutional rights under the Fourth, Fifth, and Fourteenth Amendments to the U. S. Constitution.

Plaintiff in appeal, sets forth that an overwhelming prima facie case of loss of constitutional rights had been proved and that "good faith belief" is an issue long established as suitable for jury determination. Therefore, plaintiff sets forth that the preemptory "directed verdict" was in error, and a denial of plaintiff's right to a fair trial and should

be overturned.

Trial was conducted with plaintiff acting Pro Se. Plaintiff herein laudibly indicates that prior to trial, the Court "well cautioned" plaintiff as to the possible perils of self representation. Fully realizing these perils, plaintiff elected to proceed Pro Se. It is noteworthy that no part of this appeal alleges any loss of rights due to inadequate representation at trial. In appealing Pro Se, plaintiff sets forth that the issues on appeal are strictly questions of law, and are not at all related to faulty representation.

ISSUES INVOLVED
AND
QUESTIONS TO BE RAISED

Plaintiff takes appeal from the directed verdict of the U.S. District Court for the Northern District of New York, of November 19, 1976. Appeal is divided into Four Parts, and questions to be raised are as follows:

FIRST QUESTION

HAD A PRIMA FACIE CASE BEEN ESTABLISHED PROVING
THE LOSS OF CONSTITUTIONAL RIGHTS?

SECOND QUESTION

IS THE QUESTION OF "GOOD FAITH BELIEF", A MATTER
SUITABLE FOR JURY DETERMINATION?

THIRD QUESTION

WERE CERTAIN ACTIONS OF THE COURT, PREJUDICIAL TO
THE RIGHTS OF THE PLAINTIFF TO A FAIR TRIAL?

FOURTH QUESTION

WAS A DIRECTED VERDICT EMPLOYED CONTRARY TO ITS
INTENDED PURPOSE?

HISTORY OF THE CASE AND
STATUTES INVOLVED

HISTORY OF THE CASE

Chronology of Events

Action was commenced in the U. S. District Court, Northern District of New York on August 27, 1975. Original defendants named were: LOUIS J. LEFKOWITZ individually, and as THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK.

On October 27, 1975, argument was held before Judge Edmund Port, pursuant to a motion filed by the defendants to dismiss the petition on the alleged basis that the court lacked jurisdiction as to the person, subject matter, and that the petition failed to state a claim for which relief can be granted.

At motion hearing before Judge Port, defendant's motion was granted as to defendant STATE OF NEW YORK, but was denied as to defendant in all other regards. Defendant's answer was filed on November 3, 1975. Note of Issue requesting trial by jury was filed and the matter was placed on the calendar call for the November term of Court in Albany, New York. Trial date was set for November 16, 1976.

On November 16, 1976, a jury was impaneled and trial commenced. On November 19, 1976, trial was concluded by the issuance of a "directed verdict" for the defendant by Justice James T. Foley, presiding.

On December 3, 1976 plaintiff made motion for a new trial. Argument was had on plaintiff's motion on December 20, 1976. Justice Foley denied plaintiff's motion for new trial, and on the same date, plaintiff filed his Notice of Appeal.

Statutes Involved

Petitioner's complaint was filed under 42 U.S.C. 1983, and as such became a civil rights action, complaining of the loss of U.S. Constitutional rights and damages. Plaintiff set forth that the loss of rights was incurred at the hands of a state government official, acting under the color of state law. The specific wording of the statute in question is below quoted:

42 U.S.C. 1983 - Civil Action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the U.S. or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In presenting the case to the court and the jury, plaintiff indicated in his opening statement that plaintiff's case would be presented and proved, further defining this statutory law and demonstrating the violations of the specific statute in four areas:

1. That the acts complained of, were committed under the color of state law.

2. That the acts complained of, were committed as ultra vires acts, and were executed outside the scope and duties of the responsibilities of the defendant.
3. That the acts complained of were committed with the personal knowledge of the defendant.
4. That the acts complained of were not committed in good faith belief; but rather were committed with malice.

SUMMARY OF THE TRIAL

NOTE: At the time this Appellant's brief was prepared the transcript of the trial was still not completed despite one granted continuance and extension which was granted due to the inability of the court stenographer to complete the transcript. Accordingly, Appellant is unable to identify specific page numbers in the transcript and has left this open.

SUMMARY OF THE TRIAL

Pre-Trial Conference

Prior to the commencement of the trial on the morning of November 16, 1976, a brief conference was held in Justice Foley's Chambers. The contents of this conference is a part of the record. Essentially, Justice Foley sought to ensure that plaintiff was fully aware of the possible perils of self representation by a lay person before the courts. Amidst discussion, plaintiff acknowledged awareness of these dangers, but indicated to the court, his desire to proceed despite them, and detailed his reasons therefor. With this preliminary conference concluded, the trial was commenced and a jury was impaneled.

Opening Statements

In plaintiff's opening statements, he detailed for the jury the objectives which would be established in the trial. Considerable time was spent clarifying the statute under which the case was filed. The case, being a 42 U.S.C. 1983 suit was amplified by the plaintiff with the statements that plaintiff would prove violation of the statute and do so showing that the acts were committed within the following qualifications:

1. That the acts complained of were committed under the color of state law.
2. That the acts complained of were committed as ultra vires acts, and were executed outside the scope and duties of the responsibilities of the defendant.

3. That the acts complained of were committed with the personal knowledge of the defendant.
4. That the acts complained of were not committed in good faith belief; but rather were committed with malice.

Plaintiff cautioned the jury about the word and issue of "hypnosis". Plaintiff stressed that any attitude a juror might have about hypnosis, its use, or validity, ought not to be a consideration in the trial.

In defendant's opening statement, counsel for the defendant explained fully the function and role of the Attorney General of the State of New York. He stressed that the defendant in his official capacity had both the authority and responsibility to investigate and to institute legal proceedings against any person or business which might be conducting itself contrary to law and the interests of the general public. Counsel for the defendant stressed that all actions of the Attorney General's office were committed in the forementioned interests. Defendant maintained that personal knowledge of the plaintiff or the plaintiff's business was never had by the defendant until March 4, 1975. Defendant further indicated to the jury that the defendant would prove that all actions taken by the office of the Attorney General were done in "good faith belief". Counsel for the defendant further informed the jury that the acts alleged and complained of culminated in a grand jury indictment of the plaintiff in Schenectady County, New York, and also the filing of civil charges in the Supreme Court of Albany County, New York.

PLAINTIFF'S
CASE AND PROOF

In total, plaintiff's case was presented in and through the presentation of fourteen witnesses and the introduction of eight exhibits of documents. Testimony of the witnesses for the plaintiff and the exhibits introduced is herein briefly summarized.

Separation of Witnesses

It is extremely important to note that plaintiff opened his case by moving for the separation of all witnesses. This was not opposed by the defendant's counsel. Defendant's counsel expressed amazement that such would be necessary considering that there were only persons in the courtroom who were witnesses for the plaintiff, but indicated that the defendant had no objections. Plaintiff expressed that he felt such an order was necessary inasmuch as he intended to call certain witnesses who he felt would be returning to the stand as witnesses for the defendant. It is most important to note that the Court granted plaintiff's motion. Yet, it was not honored and was wilfully disobeyed by the defendant's witnesses subsequently in the trial. This matter is integral to plaintiff's appeal and constitutes a part of plaintiff's contention that he was not granted a fair trial.

Testimony - Vera M. Vasko

The direct examination of Mrs. Vasko was essentially used to establish the circumstances of the creation of a corporation Therapeutic

Hypnosis, Inc., a corporation of which plaintiff was the principal stockholder and chief executive officer. Mrs. Vasko testified that she held a position of a corporate officer and was actively employed by the corporation. Mrs. Vasko further testified that she personally was involved in an incident which occurred in an office of the corporation wherein news media and public promotion of information about the services of the corporation were cancelled from television and radio because of statements given to the media that the corporation was "under investigation by the Attorney General".

Under cross-examination, Mrs. Vasko testified that she was a sister of the plaintiff as well as the mother of the other persons who held stock in the corporation previously.

Testimony - William G. Vasko

Under direct examination, Mr. Vasko testified that he had been an officer of Therapeutic Hypnosis, Inc. previously. He testified that his tenure and association was short. Mr. Vasko testified that from May of 1974 forward, that in essence, Therapeutic Hypnosis, Inc., and James D. McMillen were synonymous, thus piercing the corporate veil as to identity. Under direct examination, Mr. Vasko testified that he had loaned plaintiff money to place a large ad in the national edition of the New York Times, complaining of harassment and abuse of executive power by the New York Attorney General against plaintiff and plaintiff's corporation. Mr. Vasko identified the advertisement in question.

NOTE: Amidst direct examination, interruption was made wherein defendant introduced a copy of the ad in question. Plaintiff moved that the exhibit of the defendant be moved into evidence. Without objection from the defendant, it was so moved and accepted. Plaintiff further requested that the contents of the ad be read into the record. After discussion as to who would read the ad, it was agreed that Douglas Dales, counsel for the defendant would read the ad, and it was so read.

Further under direct examination, Mr. Vasko stated that at no time had any agent of the Attorney General's office ever inquired or solicited information from him as to the activities or make-up of corporation Therapeutic Hypnosis, Inc.

Under cross-examination, Mr. Vasko testified as to his family relationship to the plaintiff, indicating that plaintiff was his uncle. Counsel for the defendant alluded that the witness had not loaned money to the plaintiff for the ad, but rather that the money had been obtained through a deduction from employees paycheck. Witness denied this.

Testimony - Ronald L. Vasko

Under direct examination, Ronald Vasko testified that at a time he was an officer of Therapeutic Hypnosis, Inc. He further testified that his relationship was terminated in November 1974. Mr Vasko testified that he accompanied the plaintiff to an administrative hearing conducted by the Attorney General of the State of New York

on January 3, 1974, to investigate the activities of the plaintiff relative to an alleged treatment of one Daniel Ladopoulos. Mr. Vasko testified that he went to the hearing because he had educated Mr. Ladopoulos in plaintiff's office and was a part of his relationship with the plaintiff. Mr. Vasko indicated that he "was not permitted to testify at the hearing" ; and was made to wait outside the hearing room while the hearing took place. Mr. Vasko gave testimony of personal knowledge of the cancellation of advertising in a local radio station in Utica, New York, because of a statement made by the Attorney General's office that the plaintiff and plaintiff's business was "under investigation by the Attorney General". Mr. Vasko testified that despite being a corporate officer for a period of time, that at no time was he ever questioned by the Attorney General's office as to the activities or make-up of the corporation.

Under cross examination, defendant's counsel sought to have the witness admit that it was possible that advertising was cancelled after the appearance of the New York Times Ad., rather than because of statements of the Attorney General's Office. The witness denied this.

Testimony - Ronald Felix

Under direct examination, Mr. Felix testified that he is the President of Local #481, O.P.E.I.U., AFofL/CIO, "The Hypnotists Union". Witness testified that he previously had been employed in plaintiff's corporation as an Area Manager, and also as the President of the Union. Witness testified that he personally had sent a telegram

to Louis J. Lefkowitz, as the President of the Union, subsequent to the appearance of the New York Times Ad., placed by the plaintiff, asking Mr. Lefkowitz to cease and desist in what he felt was persecution of the plaintiff's business and business activities. Mr. Felix testified that he received no response to his personal telegram to Mr. Lefkowitz.

Under cross examination, Mr. Felix responded that the members of the union of which he was the president were largely sysonomous with those employees of Therapeutic Hypnosis, Inc. Mr. Felix further testified that he currently operates a practice of hypnosis in Buffalo, New York, of which he is the owner.

Testimony - Boris A. Wainio

Under direct examination, Mr. Wainio testified that he was a former employee of plaintiff's business as an "Area Manager". Witness testified that on February 9, 1975, he personally was witness to an unlawful search of plaintiff's business records, without a warrant, by two agents of the Attorney General's office.

Under cross examination, it was suggested that witness might have erred in what he saw and witnessed. Mr. Wainio denied this. Considerable time was put towards characterizing the layout of the offices and the distances from which the acts were to have been seen.

Testimony - Paul Holtermann

Witness testified that he was an agent of the Internal Revenue Service, U.S. Department of the Treasury. Witness refused to answer all other questions put to him under the instructions of the Internal Revenue Service commanding him to refrain from answering. Witness refused to answer that he had sworn under oath in a previous affidavit that an agent of the Attorney General's Office had contacted the Internal Revenue Service stating that plaintiff's business had \$30,000.00 in a safe on a certain day and could be had if so taken.

Testimony - Harvey Sumberg

Under direct examination, Mr. Sumberg testified that he was an agent of Metropolitan Life Insurance Company, and that in that capacity, he previously was the agent which handled the account of plaintiff's corporation. Witness testified that following a news story with picture of the witness giving a plaque to plaintiff's business, that witness was called by the Attorney General's office and asked the question "Why is Metropolitan Life Insurance Company doing business with Therapeutic Hypnosis, Inc.?" Witness indicated that he asked why the caller wanted to know. Answer given was "because they're under investigation by the Attorney General". Witness asked, "for what?" and testified that the caller refused to say.

Under cross examination, counsel for the defendant wanted to

know if the witness was sure that the telephone number he returned was in fact the Attorney General's office. Witness testified he was.

Testimony - Kenneth Klejbuk

Witness testified under direct examination that he was a former employee of plaintiff's business. Further, that on February 9, 1975, he had witnessed and seen personally an unlawful search of plaintiff's business files and records, conducted by two agents of the attorney general's office. It was established that said search took place without a warrant.

Cross examination was devoted entirely to location of the witness relative to what he testified was the physical layout of the office space in which the search occurred.

Testimony - David Weiss

Witness came to the court, by way of a Subpoena Duces Tecum, seeking certain records as to plaintiff and plaintiff's business. Witness testified that he was a licensed practicing attorney in the State of New York, working in a law firm under the name Nicholas Grasso. Mr Weiss testified that the firm had been previously retained to combat certain tactics of the N.Y. Attorney General, relative to plaintiff's business.

Witness testified that the first engagement of the plaintiff and

the witness surrounded a purported legal instrument issued to the plaintiff by the Attorney General of the State of New York. Witness was asked for a professional definition of a "subpoena Duces Tecum" - he being a lawyer and attorney. Witness testified that in essence, it was an order to "come and show". Mr. Weiss produced a copy of the instrument served upon the plaintiff. (See appendix, pts exhibit (5)). Witness introduced a copy of a letter written by Nicholas Grasso to the defendant seeking that the instrument be withdrawn as it was unreasonable, unlawful, and constituted a violation of plaintiff's constitutional rights. (See appendix, pts exhibit (2)). Mr. Weiss produced a copy of a letter from the Attorney General, withdrawing the instrument against the plaintiff. (See appendix, pts exhibit (3)).

Mr. Weiss further testified that the same identical instrument had been served upon Peat Marwick Mitchell & Co., an accounting firm hired to provide certain financial services to the plaintiff's business. Mr. Weiss indicated that his law firm had obtained a temporary injunction and restraining order from an Albany County Supreme Court Justice, keeping Peat Marwick Mitchell & Co. from turning over any records to the New York Attorney General until such time as plaintiff had opportunity to take legal action against the instrument to protect his rights. (See appendix, pltf's exhibit (4))

Testimony was given that his office negotiated an agreement with the Attorney General's office whereby the plaintiff and plaintiff's business would voluntarily produce and show for inspection, those financial records sought by the attorney general. He further testified that this was done.

Cross examination of the witness yielded that the restraining order was temporary and that it expired through a written order indicating

that the plaintiff had agreed to produce and show the financial records sought.

Testimony - Frank A. Pantalone

Plaintiff initially sought to have the witness classified as an "adverse party witness" pursuant to the Federal Rules of Civil Procedure. The Court indicated that it would wait until evidence of hostile character appeared before so classifying the witness.

Witness testified that he was the department head of the Consumer Fraud Bureau of the office of the Attorney General of the State of New York. Witness recalled that the name of plaintiff's business had been a part of the activities of his department. Witness recalled that he had talked to certain news media persons calling from the midwest, making inquiry as to Therapeutic Hypnosis, Inc., but could not recall what he had said. Witness could not recall ever talking with the plaintiff on the telephone. Witness would not deny however, that a telephone conversation might have taken place, but couldn't remember any if it did.

There was no significant information contained in the cross examination of this witness.

Testimony - George A. Cushing

Under direct examination, witness testified that he is an

Assistant Attorney General and an attorney in the General Laws Section, of the Attorney General's office. Witness testified that he personally authored and was present at the service of a purported legal instrument called a subpoena duces tecum upon the plaintiff on February 14, 1975. (See appendix, pltfs exhibit (5)). Witness produced a copy of the instrument and indentified it. Witness conceded that the meaning of the word "forthwith" was vague and difficult as to its intent. Witness conceded that "he had hoped to take plaintiff's records with him" Witness acknowledged that the instrument was withdrawn pursuant to the objecting letter of plaintiff's attorney, (See appendix pltfs exhibit (2)), and that the objections of the letter was that it constituted a violation of plaintiffs constitutional rights. Witness acknowledged that he had served an identical instrument on Peat Marwick Mitchell & Co. Witness acknowledged that plaintiff had voluntarily submitted the financial records to his office which were examined and photocopied. Witness conceded that he had obtained plaintiff's personal and business records from a formerly fired secretary. Witness further conceded that this was done without the knowledge of the plaintiff. Witness contended that a document was used which was a subpoena duces tecum, and produced a copy of this instrument, stating that it was served upon this former employee at her home. The subpoena commanded her to produce and surrender the records under penalty of the law, to an agent of the Attorney General. (See appendix, pltfs exhibit (7)). The wording of the instrument was read into the record. Witness conceded that the wording was to "Forthwith produce and surrender to an agent of the Attorney General, under penalty of the law." Witness conceded that his office did in fact obtain records through the instrument. Witness conceded that the instrument was not

of normal form, but rather was something which he had personally "drawn up". Witness acknowledged that he had personally examined the financial records of the plaintiff's business; he further acknowledged that he had made statements to the news media indicating that his estimate of plaintiff's business revenues had been 1.5 million dollars for the preceding year.

Under cross-examination, witness testified that he had never conducted any search of the premises of the plaintiff. Witness stated that all of his actions were done in good faith. Witness indicated that his actions stemmed from assignment of his superior to handle several alleged complaints instituted by consumers against plaintiff and plaintiff's business.

Testimony - John Neuberger

Under direct examination, Mr. Neuberger testified that he had been investigating plaintiff since fall of 1972. That he had been present on February 14, 1975, when a subpoena duces tecum upon the plaintiff at plaintiff's place of business. Witness cenceded that he intended to "take the records with him". Witness testified that on the same day, an identical instrument was served upon Peat Marwick Mitchell & Co. Witness testified that he personally served a legal document upon Mrs Sandra Cadan, the former secretary which compelled her under penalty of law to produce and surrender to him, all records of James D. McMillen, the plaintiff and plaintiff's business. Witness testified that pursuant to this instrument he took possession of these records. Witness testified

that among the records, were personal appointment books of the plaintiff. Witness testified that he called upon persons listed in the appointment books. Witness acknowledged that he had called upon neighbors and personal acquaintances of the plaintiff, indicating that the plaintiff was "under investigation by the Attorney General".

Under cross examination, witness stated that he never conducted a search of any of the premises of the plaintiff, business or personal. Witness stated that he was assigned the responsibility to investigate the activities of the plaintiff by his superiors, and that all actions thereafter, were in line with this assignment. Witness testified that his actions were executed in good faith belief and without malice.

Testimony - James D. McMillen

Direct examination of the plaintiff was extensive, long and covered a period of two hours. Most of the testimony given was a chronological history of the development of plaintiff's business and his relationships to the defendant. Of singular importance was that witness testified that at no time had plaintiff submitted to an examination of his personal appointment books for the practice of hypnosis, principally because, if challenged, plaintiff intended to obtain a court ruling that the practice of hypnosis would enjoy the cloak of "confidentiality". Witness testified that his appointment books had been taken from him without his permission or his knowledge. Further that he received telephone calls from persons in the books indicating that agents of the

Attorney General's office had called upon them and stated that they were in possession of plaintiff's appointment books.

Cross examination of the plaintiff principally dealt with plaintiff's educational background, his qualifications to induce hypnosis and the holding out of any special qualifications or degrees.

Testimony - Barbara Herdman

Witness testified that she was a Revenue Officer with the Internal Revenue Service of the U.S. Department of the Treasury. Witness testified that she had made certain statements in an affidavit which she identified. Witness testified that in that sworn affidavit she had made the statement that on April 17, 1975, she received a call from the office of the Attorney General of the State of New York, stating that plaintiff had \$30,000.00 in a safe at the office. Witness further testified that on that basis, the I.R.S. the next day took steps to seize the money. Witness testified that upon arriving at the place of business, she learned that there was no safe, nor was there any \$30,000.00.

Witness was asked if she had made the statement "how did you find me here, you weren't supposed to find me?" to the process server, who served the subpoena upon her commanding her appearance at the trial. The witness could not recall as having made that statement.

There was no significant cross examination of this witness.

MOTION

At this point, plaintiff rested his case. Defendant moved for a directed verdict of judgment for the defendant. Argument was had. Judge Foley reserved judgment and commanded the defendant to go forward in the trial.

PRESENTATION OF DEFENSE

Significant Objection

Counsel for the defendant sought to open his case with the calling of George A. Cushing, as the first witness for the defendant. Plaintiff vigorously objected inasmuch as the intended witness had violated the plaintiff's motion for the separation of witnesses. Subsequent to his direct testimony for the plaintiff, Mr. Cushing remained in the courtroom throughout the balance of the plaintiff's case, including the two hour testimony of the plaintiff himself. In argument before the court it became apparent that the defendant's counsel intended to call the three witnesses originally used by the plaintiff, and that all three had remained a part of the trial throughout the presentation of plaintiff's case. Plaintiff strenuously objected inasmuch as it was well established that two of the three were licensed practicing attorneys, and well knew that remaining in the courtroom was in violation of the court's order if they were to be recalled to the stand. Plaintiff contended that the use of these three witnesses would constitute an unfair violation of plaintiff's right

to a fair trial. The court overruled plaintiff's objection against the use of the three witnesses and permitted each to be called to the stand. These three witnesses solely constituted the defense's case.

Testimony - George A. Cushing

Witness testified that all actions of the Attorney General's office were consummated in good faith. Witness testified that his investigatory actions were culminated in a grand jury indictment of the plaintiff in Schenectady, New York, and civil charges being brought in the Supreme Court of Albany County, New York.

Under cross-examination, witness conceded that plaintiff had been fully acquitted of all charges in Schenectady, New York, and that the civil charges were under appeal.

Testimony John A. Neuberger

Witness testified that his activities of investigation of the plaintiff came by assignment from his superior pursuant to inquiries by the public. Witness stressed that actions consummated were done in good faith.

Under cross-examination, witness acknowledged that all of the information he had obtained in the several years of investigation, only confirmed those statements originally given him by the plaintiff on the first visit to his office in the fall of 1972.

Testimony - Frank Pantalone

Witness testified that he was the department head of the Consumer Fraud Bureau. Witness testified that his department was assigned the "policing" of gasoline stations during the energy crisis. He allowed that some inappropriate responses to inquiries might have occurred in dealing with the subject of plaintiff's business due to being overburdened and short of personnel to police the violations by gasoline stations during the energy crisis.

Witness read a departmental policy letter which indicated that it would be contrary to department policy to make statements to the public that a business was "under investigation by the Attorney General". He testified as to a conversation he had on March 6, 1975 with Mr. Louis J. Lefkowitz, the Attorney General wherein Mr. Lefkowitz was wanting to know "what the hell was going on up in Albany?" Witness indicated that Mr. Lefkowitz subsequently acquired personal knowledge of the relationship of his department with the plaintiff.

Under cross examination, witness clarified that his discussion of the oil crisis stemmed from a desire to communicate that if mishandling of the plaintiff's business occurred, it was done in good faith and amidst considerable problems being handled by his department. Witness was asked to reemphasize that if his department responded that the plaintiff was under investigation by the Attorney General, that it would be in violation of his own department's policies. Witness was asked to officially define a "subpoena duces tecum". Witness contended that despite the wording of the subpoena upon Mrs Cadan, which said "forthwith produce and surrender", it was still a subpoena duces tecum.

MOTION

The above concluding the case of the defendant, the defendant again moved for a directed verdict. Argument was heard. The court recessed for lunch and to consider the motion.

DIRECTED VERDICT

Reconvening court in the afternoon, the judge granted defendants' motion for a directed verdict, instructing the jury as to the reasons therefor, principally outlining them into two categories: One, that the plaintiff had failed to establish a prima facie case of the denial of constitutional rights, and Secondly, a fear that the jury could not properly weigh the aspect of good faith belief, which is essential to the case at hand; further, a fear of the possible awarding of damages against the attorney general.

In giving this judgment, the court complimented the plaintiff - a pro se litigant on his conduct throughout the trial. The Court indicated that it was apparent that the plaintiff had acquired considerable knowledge of federal law, but most importantly, that throughout the entire trial that the plaintiff had showed the greatest respect and honor to the court; which the judge appreciated.

Judgment for the defendant was then entered.

ARGUMENT

FIRST QUESTION

HAD A PRIMA FACIE CASE BEEN ESTABLISHED PROVING
THE LOSS OF CONSTITUTIONAL RIGHTS?

1. A prima facie case was established showing denial of
plaintiff's constitutional rights.

a. Undeniable is that plaintiff produced witnesses
to establish unlawful search, in violation of plaintiff's constitutional
rights under the Fourth Amendment to the U.S. Constitution.

b. Clearly established was the obtainment of plaintiff's
records, business and personal, unlawfully through non-definable
instruments, executed to circumvent the law.

c. Two instruments which were falsely proclaimed as
subpoenas duces tecum, were produced to establish the loss of plaintiff's
constitutional rights in both Amendments Four and Fourteen to the
US Constitution (Note: in commenting on subpoenas duces tecum, the
federal courts have set forth the following:

D.C.N.Y. 1961 "A subpoena duces tecum may be so sweeping
that it violates the Fourth Amendment's prohibition
of unreasonable searches." (In re: GRAND JURY SUBPOENA
DUCES TECUM, Addressed to Provision Salesman Distributors
Union, Local 627, AFofL/CIO, 203 F Supp 575)

"A subpoena duces tecum must be reasonable". (Id)

D.C.N.Y. 1959 "Where books, records and documents which
government sought to examine were voluminous and might
consist in part of private and personal records of
defendant, inspection thereof for purpose of identification
would have to be made under the supervision of the court
to preclude violation of defendant's rights under the
Fourth and Fifth Amendments of the U.S. Constitution"
(U.S. v Guterman, 174 F Supp 581)

D.C.N.Y. "A subpoena which is unreasonable and oppressive is violation of Fourth Amendment purporting to make the people secure against unreasonable searches and seizures." Federal Rules of Criminal Procedure, Rule 17(c), In re: Eastman Kodak Co. 7 F.R.D. 760

2. Nothing was introduced to controvert an overwhelming characterization and proof of a sequence of denial of plaintiff's rights.

a. Testimony of two eyewitnesses to seeing an unlawful search of plaintiff's business conducted by agents of the defendant.

(See testimony of Boris Wainio and Kenneth Klejbuk).

b. Testimony of defendant's agent that he prepared and executed a document to seize and impound plaintiff's records, business and personal; such being in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. (See testimony of George A. Cushing)

c. Exhibits of two instruments which became vehicles of unlawful search and seizure; such vehicles being bogus as to lawful character; such being in violation of the Fourth and Fourteenth Amendments to the U.S. Constution. (See exhibits (5) and (7)).

d. Testimony of I.R.S. Agent that defendant did give false information, purposefully to the I.R.S. concerning plaintiff; such proving both harassment and that defendant went outside the scope of his duties and responsibilities in bad faith. (See testimony of I.R.S. Agent Barbara Herdman)

e. Testimony of witness to harassment of the plaintiff by defendant.

f. Testimony of defendants agents as to their unlawful obtainment of plaintiff's appointment books, thus denying plaintiff's

rights under the Fourteenth Amendment to the U.S. Constitution guaranteeing due process of law. (See testimony of George A. Cushing and John A. Neuberger).

g. Testimony of defendant's agents that defendant became personally knowledgeable and supervised actions subsequently committed to the date of March 5, 1975. (See testimony Frank Pantalone).

h. Testimony of witnesses that corporation Therapeutic Hypnosis Inc., were synonymous with James D. McMillen.

SECOND QUESTION

IS THE QUESTION OF GOOD FAITH BELIEF, A MATTER
SUITABLE FOR JURY DETERMINATION?

1. Good faith was the only attempt at defense. It is however, a question suitable for jury determination.

2. In the least alternative, the question of good faith belief was at issue through witnesses and testimony both by plaintiff and by defendant. Accordingly, it should have been a matter for jury determination pursuant to long established court procedures. (Note: See Land O Lakes Creameries v Hungerholt, CA Minn 1963, F 2d 352)

THIRD QUESTION

WERE CERTAIN ACTIONS OF THE COURT PREJUDICIAL
TO THE RIGHTS OF THE PLAINTIFF TO A FAIR TRIAL?

1. The failure of the Court to implement plaintiff's motion for separation of witnesses was highly prejudicial and denied plaintiff a fair trial.

a. It must be noted that plaintiff opened court with a motion for separation of witnesses. This was not opposed by defendant's counsel.

b. Plaintiff further explained to the court at the time of making motion that he wished a separation to be effected to keep agents of the defendant, under subpoena by plaintiff, from listening to trial if they would be testifying for defendant.

c. The above purpose was clearly understood by both the court, and counsel for the defendant.

d. Despite courts granting of plaintiff's motion, it was not respected nor implemented by defendant.

e. Clearly contradicting the motion of plaintiff, and with full knowledge of it, defendant's only three witnesses sat in the court listening to the testimony of the plaintiff in its entirety, doing so with full knowledge of being in violation of the courts decree

(Note: It is especially important to realize that the three violators of the court's rules hold positions of authority within the department of law of the State of New York. Two of them are licensed practicing attorneys. It is beyond human reasonableness that ignorance of court procedures could justify their actions, violative of the court.)

f. It must be noted that plaintiff objected to defendants use of the three violators of court procedure as witnesses for defendant.

g. Clear is that again, the only attempt at defense came from these three violators of courtroom procedure.

h. By no means can it be held that these violative acts were harmless errors, and considering the professional knowledge and occupations of the violators, the acts can only, in themselves, give credence to plaintiff's greater claim of bad faith and negate the futile attempts made in the trial to assert a defense of good faith belief.

i. It cannot be ignored by reasonable men that plaintiff well justified the purpose and his need for the separation of witnesses to ensure a fair trial. Inasmuch as the motion was granted, it should have been honored and the failure of the court to do so totally destroyed any possibility of a fair trial.

j. During testimony of defendant's witnesses, matters came in testimony which warranted producing a rebuttal witness by plaintiff. Upon request to do so, the court acknowledged the appropriateness of such a rebuttal witness, but compelled plaintiff to produce him within the limitations of a ten minute recess. Despite plaintiff's indication that witness was enroute to the court from a local motel, the court compelled plaintiff to go forward and caused the plaintiff to rest his case without the rebuttal witness. Thus again the court denied plaintiff a fair trial.

k. Special consideration was obviously given for some unknown reason to dicta of other court. By reviewing the transcript of the record, down to this appellate court, it will be shown that Judge Foley caused to be included as a part of the pleadings, a decision of Justice Stayley, in regards to other civil litigation. There is no justification for this inclusion as a part of the proceedings. Moreover, the transmitted copy will indicate that it bears Judge Foley's writing

on it and direction to the clerk to include it in the files. This obviously declares that Judge Foley gave consideration to the Staley decision, beyond the limitations of the trial and considerations properly before him. Still, at this point there is no legal reason as to why the Staley decision was certified to the appellate court as a part of the proceedings. Its presence there cannot be explained. It is not lawfully a part of the papers and proceedings. Most importantly is that it necessarily causes the conclusion that special credence was improperly given it, and in a way not available to refutation by the plaintiff. Plaintiff only learned that Judge Staley obtained a copy (or was given a copy) at some time other than in trial, after the trial was concluded and plaintiff was inspecting the record. These actions clearly denied plaintiff a fair trial.

FOURTH QUESTION

WAS A DIRECTED VERDICT EMPLOYED CONTRARY TO ITS
INTENDED PURPOSE?

1. Considering the overwhelming quantity of evidence to indicate the loss of constitutional rights at the hand of the defendant, a directed verdict contradicted the general rules of application by the courts.

"The general rules governing any plea to displace a jury verdict are: (1) all disputed fact questions and permissible inferences must be viewed in light most favorable to plaintiff. (2) question of negligence is usually for a jury determination and it is only in rare situations where there is no occasion for reasonable men to differ that question becomes one of law for court. And (3)

It is only where all or substantially all of evidence is on one side that a directed verdict should be entered." Land O'Lakes Creameries, Inc. v Hungerholt, CA Minn 1963, F 2d 352.

"On a motion for defendant at the close of all the evidence the true question is whether there is any evidence in the case on which, if true, with all the inferences and inferences reasonable to be drawn therefrom, the jury might reasonably return a verdict in favor of plaintiff. Malewski v Mackiewicz 282 Ill App 593)

The above principles governing the use of a directed verdict are also set forth in the following cases: Simpson v Skelly Oil Co, CA Ia 1967, 371 F 2d 563; Drigotas v Doyle, DC Me 1949, 85 F Supp 908; Ford v Southwestern Greyhound Line, CA Tex 1950, 180 F 2d 934; Donnelly v Penn RR Co, 105 N.E. 2d 730, 412 Ill 155, certiori den Penn RR Co v Donnelly 73 S.C. 93, 344 U.S. 855, 97 L Ed. 663; Lindroth v Walgreen Co, 94 N.E. 2d 847, 407 Ill 121; Marshall v Metropolitan Life Ins. Co., 90 N.E. 2d 194, 405 Ill 90; Walton v Greenberg Mercantile Corp, 116 N.E. 2d 197, 1 Ill App 2d 99; Walters v Venhaus, 112 N.E. 2d 747, 350 Ill App 322; Eckhardt v Hickman, 111 N.E. 2d 199, 349 Ill App 474, App dis 116 N.E. 2d 873, 2 Ill 2d 98; Heitz v Hersheyway, 107 NE 2d 272, 347 Ill App 571; Dargie v East End Bowler's Club, 105 NE 2d 537, 346 Ill App 480.

2. The court improperly viewed plaintiff's evidence.

a. Considering the preponderance of evidence it must be weighed most favorably to plaintiff in the case at hand. The Court erred in not weighing evidence in light most favorable to plaintiff.

"In passing on motion for directed verdict, court may not pass on weight of evidence or determine where preponderance of evidence lies." (Anderson v Hudspeth, Pine, Inc., CA Colo 1962, 299 F 2d 874)

This attitude of the court is also set forth in the following cases: Johnson v Dierks Lumber & Coal Co, OCA Ark 1942, 130 F 2d 115; Grey v First Natl Bank in Dallas, CA Tex 1968, 393 F 2d 371; Crosby v Meredith CA Va, 1962, 300 F 2d 323.

3. In taking the case away from the jury through a directed verdict, the court denied the jury its true purpose.

"The trial court on a motion for directed verdict must view evidence from standpoint most favorable to adverse party and it must assume the jury may resolve conflict against moving party and from facts as found drawn inferences most favorable to his opponent."
Baltimore & Ohio RR Co. v Postom, 1949 177 F 2d 53
85 U.S. App DC 207.

This attitude of the court is also set forth in the following cases: Guest House Motor Inn Inc. v Duke, CA Ala 1967, 384 F 2d 227; Wells v Warren Co, CA Fla 1964, 328 F 2d 666; Anderson v Hudspeth Fine Inc. CA Colo 1962, 299 F 2d 874.

CONCLUSION

CONCLUSION

Each of the four questions plaintiff raises herein cause an answer which dictate that a new trial by jury on the issues is warranted.

1. A prima facie case was established - "at least" sufficient to warrant giving the case to the jury.
2. The court erred in not allowing the jury to consider the case.
3. The court in and through its actions denied plaintiff a fair trial.
4. The court's employment of the directed verdict was contrary to long established procedures for its application

Considering all of the above, plaintiff herein requests that the Judgment of the U.S. District Court for the Northern District of New York, dated November 19, 1976 be reversed and that the matter be returned to the District Court for a new trial on the issues, by jury, pursuant to the Federal Rules of Civil Procedure.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES D. McMILLEN,
APPELLANT,

NO. 77-7027

VS

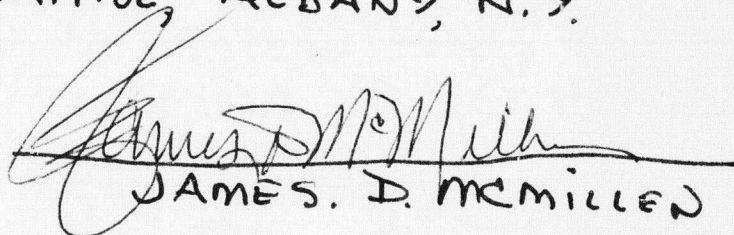
LOUIS J. LEFKOWITZ,
APPELLEE

STATE OF NEW YORK, }
COUNTY OF NEW YORK } ss

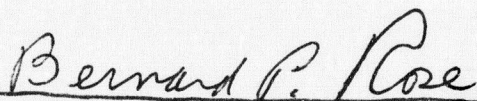
JAMES D. McMILLEN, BEING DULY SWORN
DEPOSES AND SAYS THAT:

1. ON THIS DATE HE DID SERVE THREE
COPIES OF APPELLANT'S BRIEF AND APPENDIX
ON APPELLEE BY MAILING SAME TO HIM AT
HIS OFFICE AT "THE CAPITOL, ALBANY, N.Y."

DATED 4/25/77


JAMES D. McMILLEN

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 25 DAY OF
APRIL 1977


NOTARY PUBLIC

BERNARD P. ROSE
NOTARY PUBLIC, State of New York
No. 41-859225
Qualified in Queens County
Commission Expires March 30, 1978